No. 11706.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM BARISOFF, ROBERT I. KNUDSON, HUBERT L. DAWSON, JR., and ARTHUR M. LILLY,

Appellants,

vs.

HOLLYWOOD BASEBALL ASSOCIATION, a corporation,

Appellee.

APPELLANTS' BRIEF.

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APPELLANTS' BRIEF.

Jurisdiction.

The four appellants, who are honorably discharged veterans of the armed forces, petitioned the District Court of the United States for the Southern District of California, to enforce their reemployment rights as baseball players against the appellee Hollywood Baseball Association, under Section 8 of the Selective Training and Service Act of 1940, as amended [50 U. S. C. A., App., Sec. 308], and Section 7 of the Service Extension Act of 1941, as amended [50 U. S. C. A., App. Sec. 357.] The District Court denied and dismissed the petition, and the veterans appeal. [R. pp. 2-25.]

(The Selective Training and Service Act of 1940, as amended, will be sometimes referred to herein as the "STSA".)

Jurisdiction below rested on STSA, Sec. 8(e) [50 U. S. C. A., App., Sec. 308(e)]; and jurisdiction here, over this appeal, is based on Judicial Code, Sec. 128(a)-First [28 U. S. C. A., Sec. 225(a)-First.]

Statutes Involved.

The statutes involved are 50 U. S. C. A., App., Secs. 308, 316(b), and 357, *i. e.,* Secs. 8 and 16(b) of the STSA, and Sec. 7 of the Service Extension Act aforesaid. Pertinent provisions of these Acts are:

> STSA, Sec. 8(a)—(Provides for the issuance of certificates of satisfactory completion of service to persons inducted into the armed forces.)
>
> Sec. 8(b)—"In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year." . . .
>
> > "(B) If such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;" . . .
>
> Sec. 8(c)—"Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval

forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."

Sec. 8(d)—(Not applicable.)

Sec. 8(e)—"In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action." . . .

Sec. 16(b)—(Excepts Sec. 8 from the expiration clause, and continues it in effect indefinitely.)

Section 7 of the Service Extension Act extended the benefits of STSA, Sec. 8, *supra,* to "any person who, subsequent to May 1, 1940," and prior to the termination of hostilities "entered upon active military or naval service in the land or naval forces of the United States."

Statement of the Case.

While employed under contracts requiring them to play baseball for the appellee Hollywood Baseball Association (herein called "the Club") or its assignees, the appellants William Barisoff, Robert I. Knudson, Hubert L. Dawson and Arthur M. Lilly entered upon active military or naval service in the armed forces of the United States under the STSA in 1942-44. Honorably discharged therefrom in 1945-46, each veteran made timely application for, and was duly reemployed by the Club, at an increased salary, under contract requiring him to play baseball for the Club or its assignee during the year 1946, and giving the Club the right to renew his contract for the year 1947. Shortly afterward, and within one year after being so reemployed, each veteran was "unconditionally released", or discharged; and this suit is based upon such discharges.

At the time of his induction into the armed forces, appellant Lilly was playing on the Club's active team at Hollywood; Dawson was "farmed out" to Memphis, and was playing with that club's team, although under contract to the appellee Club; Barisoff and Knudson were resting between official baseball playing seasons, but were under contract to the Club to report and play baseball for the Club or its assignees during the next year. In the baseball season immediately prior to his induction, Knudson finished the season on the Club's active team; and Barisoff, after playing part of the season on the Club's active team, had been "farmed out" to the Fort Worth club, and finished the season there. All appellants were "under contract" as aforesaid, to the appellee Club, when inducted.

Because he was so under contract, each veteran was, under "baseball law", the "property" or employee of the

Club; and, for this reason, under the rules of the National Association of Professional Baseball Leagues, by which the Club and each player was bound, the Club was obligated and required to restore him to employment, under a uniform player's contract, at an increase of 25% over his former wage, upon his return from the armed forces, under the Association's National Defense Service program. [R. pp. 119-121.]

After being "released" or discharged by the Club in 1946, as aforesaid, each veteran independently secured other employment, but at less pay, with another professional baseball club, and finished the 1946 baseball season with such other club.

During the 1946 season, the veterans lodged complaints with the Selective Service System against their said discharges. The complaints, in due course, were referred to the United States Attorney; and on January 23, 1947, their joint petition in this case was filed by the four veterans through such United States Attorney. Appellants Barisoff and Knudson petitioned the District Court to require the Club to compensate them for their loss of wages suffered by reason of the discharges, during the 1946 baseball season, only. Appellants Dawson and Lilly petitioned for both (1) restoration to employment by the Club, and (2) for their interim loss of wages, as well. [R. pp. 2-6.]

The appellee Club's answer [R. pp. 7-11] interposed, as defenses to the veterans' suit, the six claims that:

(1) Their pre-service positions were "temporary".

(2) The Club's circumstances had so changed as to make their restoration "unreasonable".

(3) They were "not qualified" to play baseball, when reemployed.

(4) They were discharged for "inability to play baseball with skill and ability," and hence, "for cause."

(5) They were guilty of laches in filing suit.

(6) And, had suffered "no loss of wages" by reason of the discharges, or a less such loss than is claimed.

The case was tried on March 6, 1947, before the Honorable Charles C. Cavanah, United States District Judge, sitting without a jury; and on March 11, 1947, the Court filed a written Opinion [R. pp. 12-15] sustaining the first *two defenses* listed above, to-wit, that the veterans left mere "temporary positions" to enter the armed forces, and that the Club's circumstances had so changed in their absence as to make their restoration "unreasonable".

Thereafter, however, on March 25, 1947, the Court approved and filed findings of fact and conclusions of law, prepared by counsel for the Club, *sustaining all six* of the above defenses; and entered judgment dismissing the petition. [R. pp. 16-25.]

Notice of appeal was filed June 23, 1947. [R. p. 25.] On July 31, 1947, orders were entered, extending the time for filing and docketing the appeal; and directing that the original exhibits be transmitted to this Court, without copying, and be returned to the District Court upon the conclusion of the case here. [R. pp. 26-27.] The appeal was thereafter duly perfected. [R. pp. 28-29, 158-164.]

On December 11, 1947, an order was entered in this Court, upon stipulation and affidavit, extending to February 1, 1948, the time for filing this brief.

Stipulation as to Exhibits.

The original exhibits are on file in the office of the Clerk of this Court, for the Court's convenience and inspection. However, the parties, by stipulation [R. pp. 162-164] have prepared and presented a Table of Contracts, the data from which, when read into the appropriate places in the Uniform Players Contract, printed in full in the Record pages 35-49 [Plaintiff's Exhibit No. 2] will enable the Court to reconstruct Plaintiff's Exhibits Nos. 1, 3, 5, 6, 8, 9, 10, 11, 13, 14, 15 and 16, without the necessity of referring to the originals filed with the Clerk.

The other exhibits, to-wit, Nos. 4, 7 and 12, are printed in full in the Record at pages 66, 72 and 85.

Conflicting Decisions of District Courts.

Opposing views, as to the reemployment rights of veterans as professional baseball players in the employ of clubs in the Pacific Coast League, are held and applied by District Courts within this Court's appellate jurisdiction. This conflict appears from two reported decisions:

Niemiec v. Seattle-Rainier Baseball Club (D. C., Wash., 1946), 67 F. Supp. 705; and *Barisoff v. Hollywood Baseball Association* (D. C., Calif., 1947), 71 F. Supp. 493, which is the case at bar.

Upon substantially identical facts in all material respects, Judge Lloyd L. Black in the *Niemiec* case held that baseball players are entitled to the reemployment benefits of STSA, Sec. 8; while Judge Cavanah, in this case, held they are not.

Comparison of the two decisions will show that the two judges are at total variance with respect to:

(1) Whether any minor league baseball players, *i. e.,* those hired under the Uniform Player's Contract of the National Association of Professional Baseball Leagues [See R. pp. 35-49, 162-163] held "positions other than temporary" with their respective employing clubs, within the meaning of STSA, Sec. 8(b)?

(2) Whether the 1946 change in the Pacific Coast League's classification, from Class AA to Class AAA, so changed the circumstances of its member clubs as to exempt them from their employer obligations under STSA, Sec. 8, *i. e.,* whether this made it "impossible or unreasonable" for them to restore the returning veterans who left their employ as players while the league was in Class AA?

(3) Whether any actual "standards of performance" existed for players employed by clubs in the Pacific Coast League, before or after the said change in classification; and especially whether there were any such "standards" for players on the Hollywood and Seattle Clubs' teams? (Judge Black found there was "no qualification or standard at all" under the evidence in the *Niemiec* case; and the same is equally true on the proof in the *Barisoff* case.)

(4) Whether a baseball club may be required, under STSA, Sec. 8(e), to rehire and pay a veteran his salary for the statutory year of reemployment (absent facts showing actual disqualification), without also being required to play him in official league games? That is whether, as Judge Black held, the club "need not play him, but it must pay him"? [67 F. Supp. pp. 706 and 708.]

Another point of departure between the two jurists is whether a baseball manager, who discharges a veteran reemployed as a player, must produce *facts* and *evidence* to prove the veteran's disqualification justifying a discharge; or whether the manager's *bare opinion* that another available player is better for his team than the veteran (without considering or offering any performance records showing "disability") is legally sufficient to support a defense of "cause" for the discharge. [Cf. 67 F. Supp. at p. 712 and R. pp. 134-135, 153-155, 146-149.]

In analyzing the *Niemiec* and *Barisoff* decisions, it should be noted that both Clubs involved, *i. e.,* the Seattle Club and the Hollywood Club, are members of the same league, to wit, the Pacific Coast League [R. p. 114, 130]; that the same change in the league's classification was considered in both cases [67 F. Supp. 713; R. pp. 14-15, 22]; that all the players involved in each case were employed under the Uniform Players Contract of the National Association of Professional Baseball Clubs, both before and after their service in the armed forces, and the terms of each of these contracts were identical except as to their names, the years of employment, and amounts of salaries [Cf. 67 F. Supp. at pp. 709-711; and R. pp. 35-49, 162-163]; that the players, in both cases, were reemployed under the National Association's rules respecting National Defense Service [67 F. Supp. at p. 713; and R. pp. 119-121]; that the defenses made by the Hollywood Club in this case were also raised by the Seattle Club in the *Niemiec* case [67 F. Supp. 707 and R. pp. 7-11]; and yet, that, *on the same facts,* the Seattle Club was held *subject* to the STSA reemployment provisions by Judge Black, while the Hollywood Club was held *exempt* therefrom by Judge Cavanah.

The sole pertinent point of difference between the two cases is this:

(1) In the *Niemiec* case, Judge Black held:

> "The employer may adopt fair and reasonable standards of qualification for work performance. *Under the evidence there was no qualification or standard at all.* In substance, the most Mr. Skiff (the manager) said was that he had the idea that Mr. Niemiec would not be able to complete the season . . . The employer may discharge at any time for cause, but that cause must be something more than prediction or hunch of a manager. And where the baseball player and the manager disagree as to the actuality of the cause, in fairness and in accord with the American viewpoint, an independent tribunal must have a right *to hear the facts and see whether or not* there be cause." [67 F. Supp. at p. 712.]

(2) In the *Barisoff* case, on the other hand, Judge Cavanah left the entire matter of whether there was cause for discharge up to the manager's discretion. *No standards whatever, and no performance records were proved by the Hollywood Club, in justification of the discharges of its four veterans.* Nevertheless, Judge Cavanah held:

> "Professional ball playing in clubs in a league seems to stand out as *different from ordinary activities,* since regular employment of players must be determined upon their skill and ability to meet the qualifications required of the class and standard of ball in the league, *and that has to be determined by the clubs who employ them, as they are taking the chances of meeting opposition*—and that is recognized when the players apply for employment, for in their contracts with the club they expressly agree

> that their services are determinable at any time *at the will of the club. It seems that the player has to satisfy the club, the employer, as to his qualifications to continue. Therefore, the statute would not apply* under the evidence in this case when confronted with the exception: 'other than a temporary position' . . . The evidence is undisputed that a higher and greater class and standard of qualifications for players in the Pacific Coast League had developed while the petitioners were not playing, or under the control of respondent, and the statute authorized the respondent to refuse to reemploy the petitioners at the time in question." [R. pp. 14-15.]

Judge Cavanah's finding that a "greater standard of qualification for players . . . had developed" is without evidentiary support. No performance records, and no "standards," either of the league, any club, or any player, were offered in evidence in this case. The Court's inference that a "greater standard had developed" is drawn from the *bare fact* that the clubs in a Class AAA league are permitted to pay their players more money than the clubs in a Class AA league; and presumably, therefore, better players would in the course of time be attracted to the AAA clubs through possible pay increases.

But there was *no evidence* whatever that, either in 1946 or at the time of trial, *any better players had been so attracted* by the change in league classification. The change was first effected in 1946, the year this case arose. [R. p. 114.]

There is no evidence to indicate that, in performance, the Pacific Coast League players, or its Clubs, did any better in 1946 than the same clubs and players did in 1942-1945.

Actually, the veterans in the *Barisoff* case were not discharged because of any "standards of performance"; for players' performance records, although kept and available to the manager and coach recommending the discharges, were *not even considered* by them, nor by any other official of the Club, in effecting the discharges. [R. pp. 109-112, 133-137, 152-155.] The *actual, and only reason* for the discharges, was stated by Robert S. Fausett, team manager, and Hollis J. Thurston, coach, to be *that there were other men available at the time for places on the Hollywood team whom they felt were better than the veterans.* [R. pp. 137, 155.] Oscar Reichow, business manager of the Club, who actually made the discharges, did so on Fausett's recommendation; and he testified that he had no independent opinion of his own about the abilities of the discharged veterans. [R. p. 109.] This was the gist of *all testimony* offered by the Club in defense of the discharges.

Specifically, Mr. Fausett testified:

> "Q. So, as a matter of fact, you don't look at the records, do you? A. That's right.
>
> Q. This whole business of picking men to go on the baseball team is a matter of the personal discretion and judgment of the manager, isn't it? A. That's right.
>
> Q. And you picked the men who would remain on the team and recommended that these men be released *because you felt there were other men available to you at the time who had better ability?* A. *That's right.*
>
> Q. At that time? A. That's right.

Q. And that was the *sole basis* upon which they were released, wasn't it? A. *Yes. It was absolutely the sole basis.*

Mr. McCall: That is all." [R. p. 137.]

Mr. Fausett's assistant, Mr. Thurston, testified to the same effect as follows:

"Q. Mr. Thurston, what standards did you use, in judging these men? Well, answer the question: What standards did you use? You say they didn't come up to standards of the Hollywood Club. Now what standards are you talking about? A. The standards of the entire league.

Q. What's that? A. The standards of the entire league.

Q. Now, what standards did you judge them by? A. It is an AAA league, and I don't think the boys can play AAA baseball.

Q. What is AAA? A. Well, it is next to the major league.

Q. So playing AAA baseball consists of what? A. You must be able to run, throw, field and hit.

Q. Each one of these men could run, throw, field and hit, couldn't they? A. Not well enough, I didn't think.

Q. Well, did you have any figures to show whether they could run, field, throw or hit? A. *I never use figures.*

Q. As a matter of fact, it has been testified, both by Mr. Fausett and yourself that *you don't bank on figures* in this matter? A. *That's right.*

Q. So, as a matter of fact, *there are no standards from the standpoint of averages or anything of that sort that you measure men by?* A. *No;* you think

if he can help you win a ball game, naturally that is what you want.

Q. So the standard that you apply to a man—isn't this correct—is this: that you have a place in mind, and there is one man and another man, and you make an opinion as to whether you think one man or another would best fit in that place. Now, is that the standard you are talking about? Isn't that it? A. Well, you have, by their play, naturally formed an opinion. You can't form an opinion until you see them both play.

Q. That is correct. A. Or until you see one play. It makes no difference. If you don't believe a man can play in the league, why, you certainly don't want to carry the man.

Q. Well, by playing in the league you mean that he is either equal to, superior to, or lesser than, some other particular person that you have in mind? A. Not necessarily. You may have four men for one position, and possibly there wouldn't be any of the four that can help you win a ball game in the league. You would have to let all four of them go and get another, one that you felt in your own mind could help you.

Q. *But there is no standard, no figure that you go by?* A. *No, I wouldn't say there are any figures.*

Q. Do you have any figures that you applied to these men? A. No, just by merely watching them play.

Q. Spring training is the time when actually the club has a lot of candidates for places on the team? A. That is right.

Q. And the standards that are applied there are that you try to pick out the men who are the best for those particular places—that is correct? A. That's right." [R. pp. 152-154; parenthesis added.]

"Q. What I am trying to get at is the *actual standard.* These men you let go *because you had somebody whose ability you considered to be better than theirs. That is the actual test, isn't it?* A. Yes." [R. pp. 152-155.]

Oscar Reichow, Hollywood business manager, who had no opinion of his own as to whether the veterans were qualified to play baseball, testified as follows:

"Q. Are you familiar with the methods used by professional baseball managers, coaches, in judging players? A. I am.

Q. Do you know whether or not there is any formula or any method of computing statistics or *any standard of that nature* that can be used in judging whether or not the baseball player has the skill and ability— A. (Interposing) *No, there is no particular formula that they use; and they don't rely on statistics* of what a player did the previous year. When they take a man into spring training they give him a lot of instruction as to how to play, how to hit and how to run and do a lot of things; and they watch him carefully, and they form their own judgment that the ball player just doesn't have the ability to remain on the ball club. It is their judgment.

Q. In other words, whether a ball player is retained, a new one is hired or whether they are released is *dependant upon the judgment of the coach* or manager or a combination of both, based upon their experience in evaluating the worth of players? A. *That's right.*

Q. Is any definite period of time of observation necessary to arrive at such a judgment? A. I don't think so. Sometimes you can take a look at a ball

player for two or three days and decide that he is not going to do you any good."

The facts so testified to are perfectly described by Judge Black's statement in the *Niemiec* case, to wit:

> "Under the evidence there was no qualification or standard at all . . . And where the baseball player and the manager disagree as to the actuality of the cause, in fairness and in accord with the American viewpoint, an independent tribunal must have a right to *hear the facts* and to see whether or not there be *cause*. To allow the employer to decide that there will be cause in the future to discharge the employee presently is a far cry from the sportsmanship Americans the country over expect from baseball." [67 F. Supp. 712.]

The following rule from *Kay v. General Cable Corp.* (C. C. A. 3, 1944), 144 F. (2d) 653, at pages 655-656, is peculiarly pertinent here, to wit:

> ". . . 'Unreasonable' means more than inconvenient or undesirable. The defendant's argument upon this point, if carried to its necessary conclusion, would defeat the main purpose of the Act and limit its operation to merely capricious or arbitrary refusals. Men and women returning from military service find themselves, in countless cases, in competition for jobs with persons who have been filling them in their absence. Handicapped, as they are bound to be by prolonging absence, *such competition is not part of a fair and just system,* and the intention was to eliminate it as far as reasonably possible. The Act intends that the employee should be restored

> to his position even though he had been temporarily replaced by a substitute who has been able, either by greater efficiency or a more acceptable personality, to make it desirable for the employer to make the change a permanent one."

A burden of unequal and unjust competition was thus imposed by the appellee Club on its returning veterans, unless professional baseball is totally exempt from all reemployment duties to returning veterans, and in a category different from all other American industries, which was what Judge Cavanah held. [R. p. 14.] Yet, Judge Black said in the *Niemiec* case:

> "I recognize the seriousness to baseball of having the judge dictate as to its players. But since it has been argued—and correctly—that baseball is the American game, certainly, then baseball ought to bear its share of any burden in being fair to service men. There are few institutions in American life which ought to feel a greater obligation. If Mr. Niemiec and all the others had failed in their job, there would be no American manager of any baseball if such should be played at the stadium this year. If the Nazis permitted baseball, it would not be an exhibition that any of us liked."

There is thus a direct and irreconcilable *legal conflict* between the *Niemiec* and the *Barisoff* cases, which merits consideration by this Court. We submit that Judge Black was right, and Judge Cavanah in error, on the above points.

Questions Involved.

The following questions are here involved:

1. Whether a baseball player hired under the terms of the Uniform Player's Contract of the National Association of Professional Baseball Leagues held a "temporary position", and was thus excluded from the coverage of the reemployment rights conferred by STSA, Sec. 8?

2. Whether the Pacific Coast League's 1946 change in classification, from a Class AA to a Class AAA league, rendered it "impossible or unreasonable" under STSA, Sec. 8(b), for its member clubs to restore their players to employment upon their return from the armed forces, *i. e.*, whether such change exempted such clubs from all reemployment obligation to returning veterans?

3. Whether there are any legal "standards or qualifications" for players employed by the Hollywood Club (or other Pacific Coast League teams) sufficient to justify a reemployed veteran's discharge, except for proved ineptness; and whether there is any evidence that the appellants were inept, or were not "qualified", or did not meet such "standards or qualifications" for baseball players, if any existed?

4. Whether, after the expiration of the reemployment year, a court may order an unlawfully discharged veteran restored to employment for the period of his reemployment year that remained unexpired when he was discharged, with compensation for his interim loss of wages, under STSA, Sec. 8(e)?

5. Whether the District Court erred in permitting witnesses called by the appellee Club to testify that, in their opinions, the veterans did not meet the "standards" of the Hollywood Club or Pacific Coast League, when no such standards or qualifications were proved, and no performance facts were given in evidence tending to show whether they met such "standards or qualifications"?

The Facts.

The ordinary incidents of baseball games are matters of common knowledge, of which the Court will take judicial notice. Therefore, no explanation is necessary of the terms "home run", "pitcher", "second base", "short-stop", "right fielder", "batting average", "runs brought in", and the like.

Baseball is played by professional, semi-professional, and amateur teams.

Professional baseball is "organized" baseball, *i. e.,* it is a business for profit engaged in by clubs which hire teams of players and exhibit them for public entertainment in games to which admission fees are charged. The owning clubs are organized into leagues of eight clubs each; and the teams employed by the clubs in each league engage annually in a series of officially scheduled games for the league's "pennant" for that year. Generally, no more than one club is "franchised" or located in any one town; and, in this brief, whenever the name of a town appears without state designation, it refers to the professional baseball club located in that town.

The club and the team are entirely separate entities. Players generally have no interest in the clubs by which they are hired.

Leagues, to which the clubs belong, are known as "major" and "minor". The major leagues are the American League of Professional Baseball Clubs, and the National League of Professional Baseball Clubs. The minor leagues, and their member clubs, are members of the National Association of Professional Baseball Leagues (referred to hereinafter as "the Association"), which is a

trade association through and under which various aspects of the business of the minor league clubs is regulated.

There are regulations extending over the entire field of organized baseball known as the Major-Minor League Rules, and the National Association Agreement, by which the clubs and leagues are bound, and the terms of which are enforced upon the clubs and on the players employed by the clubs. [R. p. 36.] These agreements and rules, the Association's rules and regulations, and the constitution and by-laws of the leagues constitute "baseball law", so referred to at pages 119-121 of the Record.

Compliance with "baseball law" is enforced by fines, suspensions, and discharges or expulsions, both clubs and players being subject to these sanctions at the hands of the commissioner, executive committee and president of the Association.

For purposes of control and regulation, the Association classifies its leagues as Class AAA, AA, A, B, C and D. One of the principal points of distinction between the classes is that, in the order listed, the total amount of money which a member club of a league may pay its quota of players decreases according to its league's classification. Thus a club in a Class AAA league may pay its players more money than a Class AA league club. [R. pp. 105, 114.] Top money, of course, is paid in the major leagues.

Minor league clubs, *i. e.,* Association members, are forbidden to employ any player except upon, and in compliance with, the Association's Uniform Player's Contract, a copy of which is set out in full at R. pp. 35-49.

The number of players a club may have under contract at any given time is limited by baseball law. During the

official baseball playing season, a club employs an "active team" and may hold a certain number of other players in "reserve," *i. e.,* "farmed out" or "optioned" to other clubs. Between official baseball seasons, all players who are under contract to the club, whether used on the active team or held in reserve, revert to a common status as players "owned," *i. e.,* players whose contracts to play baseball are held, by the club.

During hostilities in the last war, a club was permitted to have thirty players on its active team, and twelve players in reserve, or a total of forty-two players under contract at one time. Beginning with the 1946 season, the permitted number of players was reduced to twenty-five on the active team, and twelve in reserve, or a total of thirty-seven at any one time. [R. pp. 115-118, 125, 129-130.]

Since a team of nine players is all that can be used on a baseball diamond at one time, the number of "active team" players so allowed is sufficient to enable the club to carry two players for every diamond position, together with extra pitchers and utility men. Obviously, only a few of the players on the active team are, or could be, regular first-string, or star performers; and there are numerous places on every team for ordinary or mediocre players. Also, twelve other players in reserve may be held under contract, playing with other teams.

It is unreasonable to say, therefore, that merely because a player is mediocre, there can be no place for him in the employ of a Class AAA league club. There are literally thousands of baseball players, "workmen" of ordinary or mediocre skill, carried on the payrolls of good and competent baseball clubs. All baseball players can't be stars. The vast majority of players are workmen of ordinary, non-

stellar ability, who are worthy of their hire, and essential to every team and to the business of every club; and yet, who do not excel competing players in skill, in the opinion of team managers.

The Court knows this to be true, on the basis of mathematics, without any proof to that effect.

Prior to the opening of the annual baseball playing season, the clubs conduct spring training to which all players under contract must report and practice for about a month. However, they are not paid for this period of work. The team managers select their active players at these spring training sessions. *An active team of twenty-five or under* is then selected; and the club must dispose of its *reserve players* by farming them out within *thirty* days after the official playing season starts. [R. pp. 118, 119, 129.]

To cut the number of players to its permitted quotas, the club manager may "sell", "option", "farm out", or "release" players.

To sell a player means to completely assign his contract to another club, the latter taking all the rights and obligations of the assigning club thereunder. Frequently, preliminary to a proposed sale, a player is "optioned" to another club for a trial period. In "farming out" a player, he is temporarily assigned to play with another club of lower league class. A player is "released" by terminating his contract.

The Uniform Player's Contract [R. pp. 35-49] is a written agreement of employment, terminable at will by the club or its assignee (but not by the player), under which the player agrees to render "skilled service as a baseball player in connection with all games" during a desig-

nated calendar year for a stated monthly salary, to be paid only during the club's "scheduled playing season", *i. e.,* not during spring training; and agrees to play for any assignee of the contract at the salary rate "usually paid to other players of like ability" by such assignee; and agrees that the club or its assignee, by notice on or before March 1 of the following year, may renew the contract for that year, at such salary, however, as may be fixed by agreement, *or by the club,* or by decision of the commissioner or Association executive committee, the salary rate so fixed *by the club* to apply until such decision is reached. A player cannot play in professional baseball pending appeal as to his salary rate, unless he accepts such salary as the club may offer, and plays for it or its assignee. [R. p. 122.] The player also agrees to be bound by the Association's regulations printed on the contract and "such reasonable modifications of them" as the club or the Association may announce from time to time; and that the contract "shall not be valid or effective unless and until approved" by the Association's president. [R. pp. 35-43.]

The contract also provided:

> "11. This contract is subject to Federal or State legislation, regulations, executive or other official orders, or other governmental action, now or hereafter in effect, respecting military, naval, air or other governmental service, which may, directly or indirectly, affect the Player, the Club or the League; and subject also to all rules, regulations, decisions or other action by the National Association, the League, the Commissioner, the President of the National Association, the Major-Minor League Advisory Council, or the League President, including the right of the Commissioner or the President of the National Association to suspend the operation of this contract during any national emergency."

The club and player further agree, under the contract, that each will be subject to "discipline by the Commissioner or Executive Committee" for "making any agreement" between them "not embodied in the contract"; that the playing season will be fixed by the League each year; that the player must keep himself in first-class physical condition, and submit when requested to a complete physical examination at the club's expense; that the club will provide for the players' travel and maintenance expenses when away from the city of the home town of the club; that the player will report for spring training lasting not exceeding 38 days, subject to fine for failing to report, and will practice without salary for the period, although with expenses paid; and that he will not assert any claim "against any person or organization in professional baseball", except through league and Association officials. [R. pp. 35, 45-48.]

The player also agrees, under the Uniform Player's Contract, that "while under contract or reservation" to the club, "he will not play baseball otherwise than for the club or for such other clubs as may become assignees of this contract in conformity with said agreement"; that he will not engage in professional boxing or wrestling; and that, except with the written consent of the club or its assignee he will not engage in any game or exhibition of football, basketball, hockey or other athletic sport"; that "while under contract or reservation, he will not play in any post season baseball game except in conformity with the National Association Agreement and the Major-Minor League Rules and that he will not play in any such baseball games after October 31st of any year until the following spring training season, or with or against any ineligible player, or team." [R. pp. 38-39.]

The same uniform contract has been used in all minor leagues since 1942. [R. pp. 162-163.]

Under the National Defense Service program of the Association, when a player under contract to a minor league club was inducted into the armed forces during the war, his contract was suspended, and he was placed by W. G. Bramham, president of the Association, on the Association's National Defense Roster as a player leaving the service of such club. Upon returning from the armed forces, such player was entitled to be "reinstated" in the employ of that club, at a salary increase of 25% over his prior contract, by the Association president, under a new contract with the club for the current season on the uniform contract form. [R. pp. 119-121.]

All four of the appellants were so reinstated; except that in the cases of Barisoff and Lilly, their new contracts called for salaries *50% above their pre-induction pay rates, rather than 25%.* [R. p. 163.]

The facts in the case of each veteran are as follows:

William Barisoff.

William Barisoff, 25 years of age, began playing professional baseball in 1940, at the age of 18. In that year, he was put under contract by appellee Hollywood Baseball Association at $150.00 per month, and optioned to the Salinas (Kansas) Club in a Class C league. [R. pp. 30, 31, 57.] Hollywood renewed his contract in 1941 and farmed him out, first to San Bernardino, another Class C. Club; and then to Santa Barbara, a team of like class. [R. pp. 31, 57.] His contract was again renewed by Hollywood in 1942 and he was farmed out to the Anniston (Ala.) Club in the Southeastern League (Class B), where

he played a month and was then called back to Hollywood. He was a regular on the teams of the clubs to which he had been optioned or farmed out, and played in a large number of their games.

After being recalled to Hollywood he played in a few games, and was then farmed out to Fort Worth for the balance of the 1942 season, which he completed there.

In Hollywood, he played as both pitcher and outfielder as he had done for the other clubs, except that in Fort Worth he was principally an outfielder. [R. pp. 31, 32.]

In November, 1942, he was inducted into the Navy after the close of the baseball season. He was then still under contract to Hollywood (Class AA) at a salary of $200 per month; and under the contract, was required to renew it for 1943, unless released by Hollywood. [Petitioners' Exhibit No. 1, R. pp. 33, 163.]

Barisoff remained in the Navy three years. He played on service teams in two of these years. In 1943, he pitched and played outfielder for the San Diego Naval Training Station team; and in 1944, with the Camp Endicott (R. I.) Sea Bee Base team. In 1945, he was overseas and did not play baseball. He was honorably discharged December 7, 1945, and in the same month applied to Hollywood for reemployment.

Under baseball law, he was entitled to restoration at a salary increase of 25%, or $250.00 per month, for the 1946 season. However, on February 18, 1946, Hollywood, then a Class AAA league team, placed him under contract for 1946 at $300.00 per month. [R. pp. 34, 35, 50; Plaintiffs' Exhibit No. 2, R. pp. 35-49.] He was ordered to report and did report for spring training with

the Hollywood team at Ontario, Calif., for about six weeks, without pay. [R. p. 50.]

Hollywood's official 1946 season as a member of the Pacific Coast League, opened March 29, 1946.

Three days before the season started, to wit, on March 26, 1946, Robert S. Fausett, manager of the Hollywood team, told Barisoff that he was "unconditionally released." [R. pp. 50-51.] Barisoff had played only in spring training practice games. [R. pp. 51, 132, 135, 144.]

Fausett was a new manager at Hollywood, not familiar with the previous performance record and experience of Barisoff. He had no information about *any of the appellees* prior to their military service. He formed his opinion as to their abilities solely from what he was able to observe in the 1946 spring training. [R. pp. 135-136.] He did not even consider their performance records in 1946 spring training, although such records were kept. [R. pp. 136-140.] The sole reason he released them, he testified, was because *other players were available whom he considered better.* [R. p. 137.]

After his release, Barisoff was paid $150.00 as compensation for two weeks of employment.

On April 24, 1946, Barisoff was put under contract by Bremerton, a Class B club, at $175.00 per month, with a provision that he would receive 10% of the sale price of his contract, if sold. [Petitioners' Exhibit No. 3, R. pp. 53 and 163.]

Beginning with the opening of the Bremerton season on April 26, 1946, Barisoff played regularly with the club throughout the season, participating in 131 games. He first played as a pitcher, but was thereafter used as a regu-

lar right fielder and batter. His fielding record was good and his batting outstanding. He hit .340 for the season; made 40 home runs, *setting a new home run record for the league,* which had previously been 37; and made 18 triple base hits, *establishing a new league record* over the former 17. He drove in 155 runs by reason of his batting. The .340 batting average means that he got a one-base hit or better on approximately every third time at bat. [R. pp. 54-55.]

After the close of the season, on September 8, 1946, Bremerton optioned Barisoff to the New York Giants, a major league baseball club, for $12,000.00, $4,000.00 down and the remaining $8,000.00 to be paid on taking up the option, after a 30-day test with the Minneapolis club, a Class AA league team, similar in rating to that of the Pacific Coast League. [R. pp. 56, 58.] Barisoff received $400.00 as his 10% on the $4,000.00 paid by the New York Giants, under the above "bonus" clause of his Bremerton contract.

Barisoff received a total of $787.50 from Bremerton as his salary at $175.00 per month from April 26 to September 8, 1946, and the $400.00 share of the 1947 option money paid by the New York Giants. [R. pp. 56-58.] The Hollywood playing season extended from March 29, 1946, to September 29, 1946, a total of six months, for which, if he had not been discharged, he would have been paid $1,650.00 in addition to the $150.00 two week's release payment, or a total of $1,800.00.

His loss of wages for the season was thus $862.50, not deducting his $400.00 share of the option money.

In August, 1946, Barisoff complained to the Selective Service System regarding his discharge by Hollywood; and

he thereafter cooperated with that System, in Seattle and Los Angeles, and with the U. S. Attorney's Office in Los Angeles, until a suit on his behalf was filed by the U. S. Attorney, January 23, 1947. At the time of the trial, March 6, 1947, he was planning to report to Minneapolis for the 30-day trial provided for in the Giant's option. [R. pp. 56-60.]

Mr. Fausett admitted he *might have been wrong* in his estimate of Barisoff's qualifications; but he and the coach were permitted to testify that "in their opinion" at spring training he did not possess skill up to the "standards of the Hollywood Club." Mr. Reichow had no personal opinion. [R. pp. 106, 124-125, 132, 135, 144, 146, 150.]

Arthur M. Lilly.

Arthur M. Lilly, 29 years of age, began playing professional baseball with Beaumont, in the Texas League (Class A-1) in 1939, as a second baseman. In 1941, he played shortstop and second base for Texarkana in the Cotton States League; and in the spring of 1942 was put under contract by Hollywood and optioned to Tacoma, in the Western International League (Class B). [R. pp. 59-62.]

During the 1943 season he was put under contract by Hollywood, at a salary of $300 per month; and *played as a regular first string player on its active team* until he was inducted into the Army on July 9, 1943. [R. pp. 62-63, 67, 163 and Ex. 5.]

After his induction, and in 1943 and 1944, Lilly played with Army baseball teams, to wit, with the Sixth Ferrying Group team in 1943, and with a service team stationed at Long Beach, Calif., in 1944. In 1945, he was

attached to an entertainment unit, and was sent overseas to play baseball with a service team, the majority of which was composed of former major league players, *i. e.,* those who played on teams rated higher than Class AAA. [R. pp. 62-64.]

Honorably discharged from the Army on January 9, 1946, he telephoned Mr. Reichow, Hollywood's business manager, and was advised to communicate with W. G. Bramham, the Association's president and "minor league czar", who wrote him on January 18, 1946:

> "I am reinstating you to the active list of the Hollywood Club." [R. pp. 64-66, Exhibit 4.]

Pursuant thereto, on February 18, 1946, he was again put under contract by Hollywood at $450 per month. He attended 1946 spring training, and no complaints were made about his work. [R. pp. 67-68, 163; Exhibit 6.] He played with the active Hollywood team from the opening of the season, March 29, 1946, until May 26, 1946, when he was "unconditionally released", or discharged. [R. pp. 68, 73; Exhibit 7.]

At the beginning of the season, Mr. Reichow talked to him about sending him to the Birmingham club; but after some delay, Mr. Reichow told Lilly they were going to keep him on the Hollywood team and not farm him out. [R. p. 69.] Lilly played second base for Hollywood in a series of games with San Diego which his team won. He said his performance was fair. Thereafter, he played as a utility man, pinch hitting and as a relief player, until Woody Williams, the regular second baseman, broke his leg, and Lilly was used regularly thereafter as second baseman in several series of games, until another second base-

man was secured. He was then dropped back to utility for a month and then released. Lilly thought he was playing better baseball than in 1943. [R. pp. 70-73; Exhibit 7.]

On June 7, 1946, Lilly was employed by the Yakima Club (Class B) at a salary of $200 per month (250 per month reduction below his Hollywood salary), with a $500 "bonus for signing." This contract was on the Uniform Player's Contract form, and required him to renew the contract with Yakima for 1947 also. [R. pp. 74-75, 163; Ex. 8.]

Lilly complained to the Selective Service System about his discharge by Hollywood in June, 1946, and cooperated with the System and the U. S. Attorney's office in their negotiations with Hollywood, which, proving unsuccessful, resulted in the filing of this suit. [R. pp. 75-76.]

After his discharge on May 26, 1946, Lilly earned $660 salary from Yakima (June 7-Sept. 8 at $200 per month), but would have earned $1,290 (May 26-Sept. 29 at $450 per month) if he had not been discharged by Hollywood. His loss of wage was therefore $630, without deducting the $500 "bonus for signing." [R. pp. 72-77.]

After the close of the official baseball reason, Lilly played with Hermosillo, a semi-professional team, in Mexico, at $450 per month from October 16, 1946, until February 18, 1947, and thus received *$1800 for post-season work.*

His post-season earnings are not deductible in computing Lilly's loss of wages, because they were not made during any time when, if his contract with Hollywood had

remained in effect, he would have been at work playing baseball for Hollywood. As Hollywood had itself released Lilly from the contract, he had a right to utilize this *surplus time* for his own benefit, and Hollywood certainly has no right to complain, nor to derive a benefit, or windfall, from the post-season work.

The above comment is made on the premise that the post-season work might be viewed as contrary to the terms of the Hollywood contract, if it had been in effect. Actually, the evidence does not show that his post-season work was in conflict with Sec. 4(b) of the Uniform Players Contract. [R. p. 39.] And, not knowing whether there is any such conflict, we do not concede that there was.

However, what we mean to point out is simply this:

Regardless of the meaning of the contract, Hollywood has no right to claim the benefit of these post-season earnings, in reduction of Lilly's loss of wages during the preceding Pacific Coast League season.

The testimony on which Hollywood relied to show that Lilly was not "qualified" appears at pages 107, 112, 114-115, 124-125, 132, 142, 146 and 150. Other than the bare "opinions" of Fausett and Thurston that another *better player* was available to them, there are no facts in this testimony to show that he was not "qualified" to play for Hollywood, or gave "cause" for discharge. The generalization that, in their opinion, he did not meet the nebulous "standards of the Hollywood Club," we submit, is incompetent; and of no evidentiary weight.

HUBERT L. DAWSON.

Hubert L. Dawson, 26 years of age, began playing professional baseball as a third baseman for the Olean (N. Y.) Club, and in that year played also with Santa Barbara. This was in Class C and D leagues. At spring training, in 1943, he was put under contract by Hollywood, at $300 per month, and was used about five times as a pinch hitter on the Hollywood active team, until he was optioned to the Memphis (Tenn.) Club (Class A-1), in a class then next below the Pacific Coast League (Class AA). He played on the Memphis team until he entered the Marine Corps on June 24, 1943. [R. pp. 91-94, 163; Ex. 14.]

During the next two and a half years, *i. e.,* 1943-1945, he was busy fighting with the Marines, and did not play baseball. [R. p. 93.] He was placed on terminal leave April 6, 1946, and was honorably discharged April 20, 1946.

On April 1, 1946, he applied for reemployment, and signed a contract with Hollywood to play baseball at $375 per month in 1946. Before signing, he was told by Mr. Reichow and Mr. Fausett, that he was going to be released immediately, and that he was "not in the plans" for the team. He was released on April 14, 1946. [R. pp. 95-96.] On April 24, 1946, he signed with Yakima (the same team as that on which Lilly played) at $200 per month and a bonus of $450 "for signing." This constituted a reduction in pay of $175 per month under what Hollywood was to pay him. [R. pp. 96, 163; Ex. 16.]

The Yakima season started April 26, 1946. Dawson played in 143 games for the club in 1946, at shortstop and second base. He batted .262, and drove in 130 runs for the season, which gave him a standing *second from top*

in the league for the year. Before the trial, he had been offered by Yakima a 1947 contract at $300 per month. [R. p. 97.]

Dawson had no other earnings from baseball in 1946, and suffered a $676.50 loss of wages by reason of his discharge by Hollywood as follows:

Earnings: Received from Hollywood, $187.50; from Yakima $1,396; total $1,583.50. He would have made $2,240 at Hollywood (six months at $375 per month). Loss: $676.50, without considering the $450 "bonus for signing."

The testimony on which Hollywood relied to show that Dawson was not "qualified" appears at pages 106, 124-125 and 147-150 of the Record. Aside from incompetent "opinions" based on the nebulous phrase "standards of the Hollywood Club," this testimony contains nothing to show that Dawson was not "qualified to perform the duties of his former position" with the Club, *i. e.,* that of a farmed out reserve.

Dawson complained to the Selective Service System about the discharge by Hollywood within three or four days after it occurred, and actively cooperated with the System in seeking relief thereafter. [R. p. 157.]

Robert I. Knudson.

Robert I. Knudson, 21 years of age, began playing professional baseball with Hollywood in 1943, when he was 18 years old. In that year, he was a star pitcher on a high school team, until the close of school in June; and was then put under contract by Hollywood at $200 per month, and played with the active team as a "rookie" pitcher from June until the end of the season 1943. He pitched in six or seven games during that time. His con-

tract was the usual Uniform Players Contract, and he was required thereunder to play for Hollywood in 1944, if it wished. [R. pp. 80-82, 163; Ex. 9.]

In February, 1944, he entered upon active duty in the Army, and did not play baseball during his army service. He was honorably discharged May 5, 1946, after the start of the Hollywood playing season.

He applied for reemployment and on May 29, 1946, was put under contract by Hollywood at $250 per month, pursuant to the National Defense List program, and was immediately optioned to Fresno (Class C), without having worked with the Hollywood team at all. [R. p. 83.]

Fresno gave him a contract, dated June 6, 1946, for $150 per month, and Hollywood paid the difference of $100 per month between that salary and the salary called for by the Hollywood contract. [R. pp. 83-84, 163; Ex. 10, 11.] This arrangement continued from June 1, 1946, until June 29, 1946, when he was simultaneously released, or discharged, by both Fresno and Hollywood. [R. p. 83; Ex. 12.] No cause for the release was given by Fresno, nor proved at the trial. Hollywood released him because of the Fresno release.

Knudson remained idle for two weeks, and was then recalled by Fresno and given a new Fresno contract for $200 per month dated August 15, 1946, under which he played with that team until the close of its season on September 2, 1946. Hollywood made no payments to him after his July 29, 1946, release. [R. pp. 85-86, 163; Ex. 13.]

It was necessary for Knudson to have training in order to pitch well, and Hollywood gave him no practice or training after his return from the army. He had pitched

in five games, winning one, when he was released; and he played in about seven games during the season. [R. p. 87.] After the close of the season, he began attending school, and practicing pitching. At the time of trial he was in better pitching condition than during the preceding summer.

Knudson complained of his release to the Selective Service System about two weeks after it occurred; and that System and the U. S. Attorney's office processed his complaint thereafter to the time of trial.

Knudson's loss of wages due to his discharge was as follows:

Unemployed from his release (July 29) until he was rehired by Fresno (Aug. 15), making a 16-day loss at $250 per month, or $125; plus the difference between $250 and $200 per month from August 15, until September 2, the end of the Fresno season, or $25; plus loss at $250 per month for the 27 days, September 2, to September 29, the end of the Hollywood season, or $224.91. Total loss $374.91.

Knudson had returned from the army in the middle of 1946 season, and without playing or practicing with Hollywood, was immediately optioned to Fresno. As no witness for the Club saw him play, and they never studied records, there was no competent evidence that he was not "qualified" for his former job as "rookie pitcher" with the Hollywood Club.

Obviously, he was never given a chance with the Hollywood Club in 1946, and is entitled to the loss of wages he claims. There is nothing to the Club's testimony as to Knudson [R. pp. 106, 133, 147-150], avoiding this conclusion.

Specification of Errors.

I.

The evidence does not support, and the District Court erred in making, any of the following findings of fact and conclusions of law, to-wit:

(a) That when the veterans applied for reemployment, they were not "qualified to perform the duties of their former positions" with the Club. [R. pp. 17, 22.]

(b) That they were "discharged for cause, to-wit, the lack of skill and ability to play baseball according to the standards of the Hollywood Club." [R. pp. 18, 23.]

(c) That they have not, by reason of their discharges, "suffered a loss of wages in any amount, or at all" [R. p. 18]; and "will not suffer any future loss of wages." [R. p. 19.]

(d) That their increased salaries, upon reemployment were "based upon the right and privilege of respondent (Club) to terminate each such employment." [R. p. 20.]

(e) That their pre-induction positions in the Club's employ were "temporary" within the meaning of STSA, Sec. 8(b) [R. pp. 21, 12-15]; and they were "hired as temporary players," and none of them ever "developed sufficient skill and ability as baseball players to earn positions on" the Club's team. [R. pp. 22, 12-15.]

(f) That the Club's "circumstances have so changed as to make it unreasonable to require the restoration" of the veterans to positions of employ-

ment, due to the change in the classification of the Pacific Coast League to Class AAA. [R. pp. 22, 12-15.]

(g) That the veterans "waited an unreasonable length of time" to sue, thereby "prejudicing" the Club. [R. p. 23.]

II.

The District Court erred in failing to hold that by re-employing the veterans, pursuant to the National Defense Service program of the National Association of Professional Baseball Clubs, the Club estopped itself to deny that the veterans were entitled to reemployment rights, *i. e.*, estopped to deny that their positions were "other than temporary" or that they were "qualified to perform the duties of their former positions," and estopped to claim that the Club's change in circumstances made it "unreasonable or impossible" to reemploy them. [R. pp. 119-120; *Niemiec v. Seattle Rainier Baseball Club,* 67 F. Supp. p. 713.]

III.

The District Court erred in failing to hold that, under the evidence, the veterans were "discharged without cause," and were entitled to have their "loss of wages" computed on the basis of their increased salaries, agreed upon when reemployed (*since such increase was general throughout baseball*) [R. p. 120; *Niemiec* case, 67 F. Supp. at p. 713]; and erred in computing such loss of wages at their pre-induction salary rates. [R. p. 18.]

IV.

The District Court erred in crediting the Club with the amounts of the veterans' "bonuses for signing" con-

tracts with other clubs, and with the veterans' earnings in post-season baseball games, in computing their loss of wages suffered by reason of their discharges. [R. p. 18.]

V.

The District Court erred in admitting in evidence, over objection by appellants' counsel, the testimony of Robert S. Fausett and Hollis John Thurston, witnesses for the Club, to the following effect, to-wit:

> That in their opinions, each of the appellants "did not have a degree of skill and ability (as baseball players) equal to the standards of the Hollywood Baseball Club."

The testimony so objected to, appears on pages 133-137, 146-149 of the Record; and the Court's action appears on page 147.

The grounds of objection stated were:

> "Q. Do you think that Knudson possessed the degree of skill and ability sufficient to equal the standards of play of the Hollywood Baseball Club? A. I do not.
>
> Mr. McCall: If your Honor please, I want to object to that question. The manager, the playing manager who just left the stand testified that he did not take into consideration any of the records the player may have had of his play. They didn't know anything about the records and that what he had done, the sole standards that they had were, that he, the manager, decided *whether in his own mind the man had ability greater than another man.*
>
> The Court: This man may have proceeded differently; so let him testify. He is not bound by the other man's testimony.

Mr. McCall: The other man, if your Honor please, was the man who made the decision; and there were no standards he followed.

The Court: Overruled. I think he should answer . . .

Mr. McCall: If your Honor please, I would like first for counsel to specify what he means by 'standards.' If we understand 'standards,' then we can talk about something. But this is pure speculation he is talking about. What are the standards of the Hollywood Club? I object to it because *there are no standards he is talking about,* that is, that *they haven't shown any standards other than the preference of the manager.* The question calls for something that is *speculative entirely,* unless he shows that there are some standards that he is talking about." [R. pp. 146-148.]

VI.

The District Court erred in failing to find and hold, in conformity with the evidence, that the veterans left "positions other than temporary positions" in the Club's employ in order to enter the armed forces; that the Club's "circumstances had not so changed" as to make their restoration to their former positions in its employ "impossible or unreasonable"; that they were "qualified to perform the duties of their former positions," and were duly reemployed at increased salaries pursuant to a general wage increase throughout all baseball; that they were "discharged without cause" within one year after their restoration; and suffered a "loss of wages" by reason thereof; and are entitled to the relief claimed in their petition [R. pp. 12-25.]

ARGUMENT.*

I.

Ball Players Hired Under the Uniform Player's Contract Held "Other Than Temporary Positions," Under Baseball Law and Under STSA Sec. 8(b), and Were Entitled to Be Reemployed After Military Service in Those Positions.

Employment for an indefinite period of time, such as employment at will, is employment in a "position other than a temporary position" under STSA, Sec. 8(b). *Opinions of the Attorney,* Vol. 40, No. 106 (April 8, 1946), modifying 40 Op. A. G. Nos. 36, 66 and 92; *Trusteed Funds, Inc. v. Dacey* (C. C. A. 1, 1947), 160 F. (2d) 413; *Daniels v. Barfield* (D. C., Pa., 1947), 71 F. Supp. 884, 886; *David v. Boston & M. R. Co.* (D. C., N. H., 1947), 71 F. Supp. 342, 345.

Even seasonal employment, if customarily renewed at annual rests, has been held to be "other than temporary," and to afford veterans reemployment rights. *Stanley v. Wimbish* (C. C. A. 4, 1946), 154 F. (2d) 773; *Grone v. Congregation, etc.* (D. C., Ky., 1947), 72 F. Supp. 544; *Unruh v. North American Creameries* (D. C., N. D., 1947), 70 F. Supp. 36.

The "recurring seasonal employment" rule should itself afford the veterans relief, without more; for, the contracts of Lilly and Barisoff had been renewed from year to year under the proof, and this was evidence of a custom.

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*Note: The evidence, generally and as to each veteran, is stated with citations to the Record under the Facts, *supra;* and a reference thereto in connection with this Argument is here made, without duplicating at length the citations there given.

However, the veterans' rights here are *not dependent* upon that rule. They held "other than temporary positions" under the Uniform Player's Contract, aside from the rule. The contract itself [R. pp. 36-49] shows that it was not seasonal, but annual; and that unlimited renewals thereof for the indefinite future were contemplated by the Club and players.

The Attorney General has given probably the most concise statement of the meaning of "other than temporary position" in the following paragraph from 40 Op. A. G. No. 106 (April 8, 1946), to-wit:

> "To determine whether a position was 'temporary' one requires an examination of the contract or understanding of the employer and the employee, as well as the conditions and character of the employment. If the employer and the employee *could reasonably expect, from the conditions surrounding the employment, that the employment was not for a short and limited period,* the employee should be held to be within the group protected by the statute." (Page 4 of the Opinion.)

Analysis of the Uniform Player's Contract shows that it is a contract providing for year-round duties and restrictions on the player, who, although he gets paid only during the official playing season, acknowledges that his salary for that reason is also "consideration" for the "reservations" to the Club covering his activities between playing seasons, and extending into the next, including

spring training, and also consideration for the Club's "renewal option" on his services for the next year. [See Secs. 4(a-b) and 8(a-c), and Regulation 8 of the Uniform Player's Contract, R. pp. 38-39, 41, 47.] The Club must employ each player, under baseball law, under a signed Uniform Player's Contract, filed with and approved by the president of the Asosciation. [Secs. 12 and 13, R. p. 43.] The renewal contract would itself be renewable for the next year, *ad infinitum. Niemiec Case,* 67 F. Supp. at pp. 709-710.] So that, the Uniform Player's Contract is an employment contract renewable by the Club indefinitely, although at annual rests, and contemplates employment for the indefinite future, or for so long as the Club wishes.

Presumably, such a contract would be renewed annually for so long as the player's services might be acceptable to the Club; and that is the same as any other employment at will in any other industry. The contract binds the player, at the Club's option, for so long as he wishes to remain in organized baseball. The Club might not be able to compel him to play baseball for it or its assignee, in the event of a renewal unsatisfactory to him as to salary; but it could prevent him from playing with any other club in organized baseball. This "renewal" right is a hold over of a player not enjoyed generally by employers in other industries.

Of course, a player "could go to Mexico," if dissatisfied with the pay rate fixed for him upon renewal of his

contract by the Club, the Executive Committee or the Commissioners, but *he could not play in organized baseball in this country.* [R. pp. 41-44; Secs. 8-9; and R. p. 123.] This "might be pretty hard on him," as the District Court observed [R. p. 123]; but it is contemplated by the agreement, and was so understood by the Club and players.

Hard or not, the point here is that the Uniform Player's Contract contemplates something more than seasonal, or even annual work; it is a *lease on the player's future in organized baseball* which the Club may sell for profit, and it thus envisions a relationship confined not to one season, or to one year, but extending to the indefinite future.

This relationship was terminable at any time by the Club, but not by the player. [Sec. 5(b), R. pp. 40, 162-164.]

The contract provided not only for services to be rendered directly to the Club, but also for services to "any other club" to which the player might be assigned. [Secs. 3(a) and 5(a), R. pp. 38-39.] A hiring for the "club or its assignees" is thus stated; and in playing for another club, a "farmed out" or "optioned" player (a "reserve") is rendering "stand-by" services for the club which owns his contract.

Reserves are not "probationary employees" in any true sense. The probationary period occurs at the annual spring training season when 37 "active and reserve" players are put under contract. Within 30 days after the

opening of the official playing season, these must be divided (or "cut down") to 25 on the "active list" and not more than 12 on the "reserve list." [R. p. 118.]

A reserve player assigned to another club, therefore, is performing the service called for by his contract, just as a player on the active list. The latter may also be "farmed out' or released at the club's pleasure. Each has the same contract status. The fact that officials of the club may privately think of a reserve or even a second-string active player, as being in "probationary use" is not controlling. For there is no "probationary period," or condition, and no contract difference between a star, a second stringer, a "reserve," or an "active" player. All uniformly hold "other than temporary positions" under the STSA.

Furthermore, a significant feature of the National Defense Service program is that a reserve list player was required to be reinstated by the club holding his contract, just as any active player. This was a recognition of the fact that a reserve was a regular and not a probationary player. This reinstatement requirement was also one of the implied terms of the reserve player's employment agreement, to-wit, that if he should be drafted he would be reinstated by the assigning club, regardless of the club with which he might have been playing when called to the colors.

The employment relationship, therefore, was direct and non-probationary.

The four veterans, in fact, were not all reserves.

Dawson was the only one who was a reserve when he entered the armed forces. He happened to be "farmed out" to Memphis at the time. Lilly, on the other hand, was on the Hollywood first-string line-up when he entered the armed forces. Knudson had finished the last playing season on the Hollywood active team; and both Knudson and Barisoff, who had finished the season "farmed out" to Forth Worth, were drafted in the between-seasons lull, and at a time when they were required to appear for Hollywood's next spring training season under their contracts. Barisoff had reverted to the common pool of Hollywood players under contract.

There was thus nothing seasonal, probationary or temporary about the veterans' employment. They could "reasonably expect" that their employment was not for "a short and limited period"; and, under the rule stated by the Attorney General, they held "other than temporary positions" entitling them to reemployment under the STSA as well as under baseball law.

The District Court viewed the "at will" nature of their employment as rendering it "temporary" [R. pp. 12-15]; whereas, it is this very factor which characterizes it as "other than temporary" in the view of other courts. See *Trusteed Funds, Inc. v. Dacey; Daniels v. Barfield, and Davis & Boston & M. R. Co., supra;* and compare the *Niemiec Case, supra.*

II.

The Appellee Clubs' "Circumstances" Had Not So Changed as to Make It Impossible or Unreasonable to Restore the Veterans to Their Former Positions in Its Employ; and the Evidence Does Not Support the Findings That They Were Not "Qualified" Therefor, or That They Gave "Cause" for Discharge.

It is no part of the veterans' Argument that they were (star) performers on the Hollywood team when inducted.

They were players of ordinary, mediocre skill, and this Argument goes no farther; although Barisoff's 1946 record at Bremerton, setting two new batting records for the league, and Dawson's record with Yakima, second from top in runs brought in, indicate they had unusual ability. We do not claim unusual qualifications, however.

Prior to induction, only Lilly was a first string Hollywood player, and he for only a few weeks. Dawson and Barisoff last played as Hollywood reserves, with Memphis and Ft. Worth, and Knudson was a mere "rookie" pitcher for Hollywood. None were stars.

The basic question then is: Whether the Pacific Coast League change, from Class AA to Class AAA, made it "unreasonable" to reemploy returning veterans of ordinary, mediocre skill in that league? The answer should have been "No."

The league classification change merely authorized larger salaries for players. It did not automatically insure immediate better baseball, or better players, to any club in the league. Better baseball depended upon securing better players; but better players would have to come from

the major leagues, which continued to pay better salaries than even the top class of minor league clubs. Also, good professional ball players were already bound to other clubs under the Uniform Player's Contract. Since each club had to depend upon its quota of men bound to it under such contracts to supply the core of its team for the next year, it was not reasonably to be expected that there would develop any sudden influx of loose, stellar talent to the Pacific Coast League in 1946 merely because its clubs could pay increased salaries.

As a practical matter, marked improvement in the league's talent would have to await several seasons. It could not be immediate. Better players would have to become available as free agents, and lured with "bonuses for signing"; or bought from clubs holding their contracts, at prices proportionate to their real worth as players.

The task of improving a professional baseball team is thus not a mere overnight stunt. It requires time as well as much money. Better players have to be both found and secured, before there is better baseball; and stellar players are scarce, already tied under contracts, and come rather dearly.

The proof does not show that in 1946 there was any improvement whatever in talent in the Hollywood Club or the Pacific Coast League. Presumably, therefore, there was no improvement, since the burden was on the Club to make out this defense.

The Association's National Defense Service program, under which these veterans and others were reinstated in the Pacific Coast League clubs, is a recognition of the facts: (a) That the classification change did not affect

reinstatement rights under that program; and (b) that players of ordinary skill and ability were entitled to reinstatement in the Pacific Coast League. This program covered all clubs in the league; and Hollywood was entitled to no greater freedom than Seattle, although such an advantage was given Hollywood by the decision in this case.

These veterans were "qualified to perform the duties of their former positions" as *ordinary baseball players, i. e.,* on the second string or reserve list. There is no evidence that they were not so qualified. The fact that they secured other places in organized baseball, and gave satisfaction in some evidence that they were so qualified. This observation covers the cases of Lilly, Barisoff and Dawson completely.

It is true that Knudson was released by Fresno shortly after he went there, but the record affords no evidence that such release was for "cause." Fresno had the right to release him, with or without cause. His release by Fresno did not, *per se,* justify Hollywood's simultaneous release, for that could be justified only by "cause." 50 *U. S. C. A.* App., Sec. 308(c). He was, in fact, recalled and played by Fresno after his release.

"Unreasonable" means more than "less desirable," "inconvenient" or "more expensive"; and more than that another employee is better or more efficient. *Kay v. General Cable Corp.* (C. C. A. 3, 1944), 144 F. (2d) 653.

That a better player is available to the employer is not "cause for discharge" of a veteran during his reemployment year. *Kay v. General Cable Corp.,* and *Niemiec Case, supra; Hoyer v. United Dressed Beef Co.* (D. C., Calif. 1046), 67 F. Supp. 730.

III.

By Reemploying the Veterans, the Hollywood Club Is Estopped to Deny They Were Qualified, and Estoppel to Claim That Its Changed Circumstances Made Their Reinstatement "Unreasonable."

If the Club had reason to claim that the veterans were not qualified, or that its changed circumstances made it unreasonable to reinstate them, it could have processed the dispute under the Association. [Sec. 9, R. p. 41.]

Instead, the Club reinstated the veterans. Upon accepting the proffered employment, the veterans acknowledged their subservience to the Hollywood Club in the realm of organized baseball, and gave up their status as "free agents." Thereafter, they could seek other like employment in organized baseball only after being released (discharged) by Hollywood, a circumstance which would affect their desirability as players with other clubs, and reduce the amounts of money they might receive as salaries or as "bonus for signing" with other clubs.

Hollywood's failure to process its claim under Section 9 of the contract, at the time the veterans applied for reemployment, caused them to alter their positions by accepting the work, to their prejudice.

Having put these men under contract for 1946, the Club waived these defenses and is estopped now to assert them. (*Niemiec Case, supra,* at p. 713.)

IV.

The Veterans Were Not Guilty of Laches.

The doctrine of laches is based on estoppel, and the maxim of unclean hands. It is an affirmative, equitable defense. Mere lapse of time does not constitute laches. In addition to lapse of time, the party asserting laches must show that the delay was not induced by any act of his; and that, because of the other party's inexcusable delay, *his position has so changed* as to make it inequitable for the other to have relief. 30 *Corpus Juris Secundum,* 531-537, Equity, Sec. 116; 2 *Cyc. of Fed. Proc.* (1928), 506-514, Sec. 412; 5 *Cyc. of Fed. Proc.* (2d, 1943), 52 *et seq.,* Secs. 1519-1520, 1526, 1527; *Smetherham v. Laundry Workers Union* (1941), 44 Cal. App. (2d) 131, 111 P. (2d) 948, 952-953; *Winn v. Shugart* (9 C. C. A., 1940), 112 F. (2d) 617, 623.

The Club's position as to these veterans was not changed. Negotiations by the Selective Service System begun promptly after the discharges, did not induce the Club to make any amelioriation.

As said System was a governmental agency acting in the public interest on behalf of the veterans, its failure to secure an adjustment with the Club is not to be charged as laches to the veterans. The same is true of the United States Attorney's office. *Kay v. General Cable Corp.* (D. C. N. J., 1946), 63 F. Supp. 791; *Hayes v. Boston & M. R. Co.* (D. C. Mass.), 66 F. Supp. 371, 373; 50 *U. S. C. A. App.* Sec. 308 (*e. g.*).

The mere fact that the Club persisted in its unlawful action toward the veterans, thereby causing their loss of wages to increase, is not laches. *Smetherham v. Laundry Workers Union, supra.*

V.

The Veterans Were Entitled to General In-Grade Increases in Salaries; and to Have Their Loss of Wages Computed on the Basis Thereof, Without Deductions of "Bonuses for Signing" Contracts With Other Clubs After Discharge, or Deductions of Post-Season Earnings.

The Uniform Player's Contract refers to "the salary rate usually paid . . . to other players of like ability," and obligates a player, upon being assigned to another club, to accept the salary rate usually paid by that club. [Sec. 5(a), R. p. 39.]

A provision of the National Defense Service program was that veterans should be reinstated at a 25% salary increase over their former positions. [R. p. 121.] This was a general in-grade increase for veterans, and they were entitled to it, and to have their loss of wages computed on the increased wage at which they were re-employed. *Niemiec Case* at 67 F. Supp. 713; *Levine v. Berman* (C. C. A.-7, 1947), 161 F. (2d) 386; *Martin v. Doane Co.* (D. C. Mass., 1947), 68 F. Supp. 783, aff'd on this point on appeal (C. C. A.-1, July 17, 1947); *Freeman v. Gateway Baking Co.* (D. C. Ark., 1946), 68 F. Supp. 383.

The same is true, under the same authorities, with respect to a player who has been reemployed at a higher individual rate of pay than 25%, as in the case of Barisoff and Lilly, whose contracts called for a 50% wage increase. The reemployment provisions do not limit the amount of pay a veteran is to receive when restored to his former position. The words "like pay" merely furnish a wage floor, not a ceiling. *STSA,* Sec. 8(b)(B), 50 *U. S. C. A.* App. Sec. 308(b)(B). The loss of wages is to be

computed under Section 8(e) not at the wage of the *former* position of the veteran, but at the wage of the position from which he is "discharged without cause" contrary to Section 8(C), meaning the position in which he has been *reemployed.* 50 *U. S. C. A. App.* Sec. 308(c. e).

There is no evidence whatever, to support the finding that the increased wages were "based upon the right and privilege of respondent (the Club) to terminate each such reemployment." [R. p. 20.] No one so testified, and no such claim was advanced at the trial.

The "bonuses for signing" contracts to play baseball with other clubs were not "earnings" for the 1946 playing season, which was the sole time in which Hollywood had an interest. The bonuses were for control of the player's future in baseball, including all renewals of the contract. Hollywood had abandoned its option by discharging the veterans.

Presumably, they will have to reimburse the clubs for these "bonuses", if they should be reinstated with Hollywood; and such bonuses ought not to be *charged twice to the veterans,* once in favor of Hollywood and again in favor of the other clubs.

"Earnings in other employment", if deductible in computing a veteran's loss of wages, means compensation for work, not extra income. Thus, the expression does not include earnings from work performed during a time when the veterans would not have been employed by Hollywood, which had abandoned its option on their future work. 39 *Corpus Juris* 116-117; 16 *Cal. Jur.* 986; *Sanders v. Schenley Products Co.* (C. C. A. 2, 1939), 108 F. (2d) 23, 25. Nor does it include strike benefits or governmental benefits, which are not "earnings." *Hoyer v.*

United Dressed Beef Co. (D. C., Calif. 1946), 67 F. Supp. 730; *N. L. R. B. v. Brasher Freight Lines* (C. C. A. 8, 1942), 127 F. (2d) 198; *Marshall Field & Co. v. N. L. R. B.* (1943), 318 U. S. 253.

The "bonuses" given Dawson and Lilly by Yakima, and the Barisoff's 10% split with Bremerton on the Giants' $4,000 payment for his option, were for *future employment and renewal rights,* not for 1946 playing season salaries. Consequently, this extra income cannot be claimed by Hollywood in reduction of the veterans' loss of wages.

The same is true of Lilly's $1,800 earnings from Hermosillo, in Mexico. These were earned at a time when Lilly would not have been gainfully employed under his Hollywood contract.

VI.

Testimony of the Club's Witnesses (Fausett and Thurston) That in Their Opinions the Veterans Did Not "Have a Degree of Skill and Ability Equal to the Standards of the Hollywood Club" Was Both Incompetent, and of No Evidentiary Weight.

These naked opinions were not supported by factual testimony. That is, no facts concerning the actual performance of the veterans were given in evidence as the basis for any such opinions; and no measure of standard of performance was proved. The testimony was therefore nebulous, conjectural, and of no value whatever. [R. pp. 133-137, 146-149.]

A standard is "an accepted or established rule or model." It is also defined as:

> ". . . Being, affording or according with a standard for comparison."

"That which is set up and established by authority as a rule for the measure of quality, weight, extent, value or quality; esp. the original specimen weight or measure."

"That which is established by authority, custom or general consent as a model or example; criterion; test; in general a definite level, degree, material, character, quality or the like, viewed as what is adequate and proper for a given purpose."

Webster's New International Dictionary (2d Ed.).

The gist of the two witnesses' testimony was that there are no such standards to which they were referring; that the matter of employment rested entirely with the team manager; and that the veterans were released solely because other men were available whom they considered better.

An expert, testifying as to his opinion based on facts within his own knowledge, must first state those facts on which his opinion is based. His naked opinion is not evidence. *Raub v. Carpenter,* 187 U. S. 159, 47 L. Ed. 119, 23 S. Ct. 72; Note: 82 *A. L. R.* 1340; Text: 20 *Am. Jur.* 666-668, *Evidence* Sec. 794-795.

The existence of standards is as much a fact to be proved as are the facts to be measured by the standard. If there are neither standards nor facts in evidence, an opinion based on the two is too nebulous and conjectural to rise to the dignity of evidence. *Atlantic L. Ins. Co. v. Vaughn* (C. C. A. 6), 71 F. (2d) 394, 395; *U. S. v. Howard* (C. C. A. 5, 1933), 64 F. (2d) 533, 534-535; *U. S. v. American Tobacco Co.* (D. C. Ky., 1941), 39 F. Supp. 957; *Eisenmayer v. Leonardt* (1906), 148 Cal. 596, 600,

84 Pac. 43; *Hornby v. State L. Ins. Co.,* 106 Neb. 575, 184 N. W. 84, 18 A. L. R. 106; Texts: 20 *Am. Jur.* 661, 666, *Evidence,* Secs. 787, 795, and 32 *C. J. S.* 220, *Evidence,* Sec. 522.

The testimony objected to proved nothing except that, as stated in the *Niemiec Case, supra,* there was no standards or qualifications at all, and the opinions were worthless for any purpose, though admitted. *U. S. v. Howard, supra.*

VII.

The Lapse of a Year After Original Reinstatement by the Club Has No Effect on the Jurisdiction of the Court to Order Reinstatement of the Veterans for the Period of the Reemployment Year That Remained Unexpired When They Were Unlawfully Discharged, or to Award Their Interim Loss of Wages.

Although some District Courts have expressed the view that reinstatement cannot be ordered after the end of one year from the date of reemployment under STSA, Secs. 8 (c, e), this view is out of harmony with the purpose and language of the law, and is an unjustified, self-imposed negation of powers by such courts.

The one-year period was inserted in Section 8(c) for one purpose only, namely, to *forbid the discharge of a reemployed veteran* within that time. It has nothing to do with when he may be reinstated. The purpose of the law was to rehabilitate veterans by affording *a year of*

active work in which to regain and refurnish their skills, and to protect them therein against arbitrary discharges and unequal competition. *Kay v. General Cable Corp., supra.* The period of this protection was not intended by Congress as a limit on judicial action to enforce it.

When a veteran has been rehired and discharged without cause, he has not received the benefits which the law provided for him; and the District Courts in that case can "require the employer to comply with the provisions of Sections 8 (b and c)" by ordering reinstatement and compensation for loss of wages. *STSA,* Sec. 8(e), 50 *U. S. C. A.* App. Sec. 308(e).

Now, it is quite clear that the one-year period does not start *until the date when the veteran has been restored* to employment. So, the employer may be compelled, when reemployment has been totally denied, to reinstate the veteran for a full year with interim loss of wages from the date of his application. *Kay v. General Cable Corp.* (D. C. N. J., 1945), 59 F. Supp. 358 (D. C. N. J., 1946), 63 F. Supp. 791; *Hall v. Union Light & Power Co.* (D. C. Ky., 1944), 53 F. Supp. 817; *MacMillan v. Montecito Country Club* (D. C. Calif., 1946), 65 F. Supp. 240.

Assuming, however, that instead of being refused reinstatement at the outset, the veteran has been first hired and then fired unlawfully. Is he any less entitled to the full year of work (with interim loss) than his brother-in-arms who was refused work when he applied? There can be no doubt that the District Courts can, and should, com-

pel his reinstatement for the portion of the reemployment year that remained unexpired when he was discharged. Such a rule equalizes the rights of veterans, *inter sese,* and makes the employers' obligations equal.

If it is proper to compensate the first veteran with a full year of work plus his interim loss of wages preceding his forced reinstatement, it is just as proper to compensate the unlawfully discharged veteran for his interim loss, after his discharge and before his second reinstatement. *Hoyer v. United Dressed Beef Co.* (D. C. Calif., 1946), 67 F. Supp. 730.

Under the contrary rule, an employer, by flouting the law, cuts down the veteran's assumed year of rehabilitating work, and escapes by merely paying him his "loss of wages" for that year. Thus, he accomplishes the very thing which, in *Kay v. General Cable Corp.,* the Court said could not be done, namely, force the veteran to accept *a year of wages in lieu of the year of work Congress provided;* except that the year's wage, in fact, is further reduced by his earnings in other employment. The primary purpose of the Act is thus evaded.

The expiration of the calendar year during the continuance of an employer's "unlawful action" ought to afford the employer no such unfair advantage. He should be required to give the veteran the year of work provided by the law, although he has delayed it by disobeying the law. No other rule is consistent with the purpose or language of the reemployment provisions.

VIII.

There Is No Characteristic of the Baseball Business Which Entitles It to Exemption From the Common Obligation to Reemploy Veterans.

The reemployment provisions apply to "any employer." 50 *U. S. C. A.* App. Sec. 308(b).

The reasoning of the District Court herein, however, would exempt any employer whose work force is limited, whose business is competitive, and whose employees agree to be discharged at will. [R. pp. 12-15.] This describes any small business.

If this rule were generally applied, only large employers with job security written into union contracts, would fall within the meaning of "any employer" in the reemployment provisions.

The manifest truth is that a baseball club is not different from any other small employer. All such businesses are competitive, the number of employees they may use is limited (whether by business economics or Association rules is immaterial), and it is not at all a rare occurrence for a small employer to find it more desirable, efficient or convenient to fail to reemploy returning veterans. Others have had to comply, why not Hollywood?

Mere competition is no justification for relieving an employer of his clear obligations under the law. To relieve one is to give him an advantage over his competitors, who must obey law. Which was precisely what was done in this case, to-wit, Hollywood was liberated while its competitor, Seattle, was forced to meet its duty of reemploying veterans. This was unfair. It is not "unreasonable" to require competitors to observe the same rules.

There is not a single characteristic of baseball by which it may be distinguished from any other small, competitive business. The Act covers all employers, and exempts none.

Conclusion.

The views of the District Court as to the coverage of the reemployment provisions were out of harmony with other courts, and ought to be rectified.

Notwithstanding the *Niemiec Case,* the Club took the position in court that the team manager was the sole judge of whether a ball player might be retained in employment, regardless of the reemployment provisions. Accordingly, it made no effort to show by proof that the veterans were not qualified to fill their former positions with the Club. It relied wholly on the *ipsi dixit* of the manager, that the veterans should be discharged because other available men were better, in his opinion.

We submit this did not show any "cause for discharge," and did not show any disqualification, and that the veterans are manifestly entitled to relief.

Respectfully submitted,

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